161 U.S. 1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 735.

161-1

THE CHEMICAL NATIONAL BANK OF CHICAGO,
PLAINTIFF IN ERROR,

vs.

HARTFORD DEPOSIT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED SEPTEMBER 21, 1895.

(16,025.)

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from appellate court, first district	2	1
Assignment of errors	3	1
Caption	4	2
Order granting leave to file reply brief and taking cause under advisement	5	2
Judgment	6	2
Order allowing appeal	7	3
Clerk's certificate	8	3
Assignment of errors	9	3
Transcript from the superior court of Cook county	11	4
Declaration	11	4
Copy of account sued on	15	6
Affidavit of amount due	15	7
Summons	16	7
Sheriff's return	17	8
Appearance for defendants	17	8
Plea	18	8
Judgment	19	9
Allowance of appeal	19	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1895.

	Original.	Print.
Bill of exceptions	20	10
Stipulation as to facts	20	10
Lease from Hartford Deposit Company to Chemical National bank, November 18, 1892	22	10
Notice from receiver to Hartford Deposit Company, July 27, 1893	37	18
Agreement between receiver and Hartford Deposit Company, July 31, 1893	38	19
Judge's certificate to bill of exceptions	40	20
Stipulation as to bill of exceptions	40	20
Clerk's certificate (superior court)	42	20
Assignment of errors	43	21
Clerk's certificate (appellate court)	44	21
Order taking cause under advisement	46	22
Opinion	48	23
Judgment	60	27
Petition for writ of error	62	27
Order allowing writ of error	63	28
Writ of error (copy)	64	28
Citation (copy)	65	29
Bond	66	30
Clerk's certificate	68	31
Assignment of errors	69	32

1 STATE OF ILLINOIS:

Supreme Court, Southern Grand Division, May Term, A. D. 1895.

At a supreme court of the State of Illinois begun and held at Mt. Vernon on Tuesday, the seventh day of May, in the year of our Lord one thousand eight hundred and ninety-five, within and for the southern grand division of said State, to wit, on Tuesday, the 7th day of May, A. D. 1895.

Present: Hon. J. W. Wilkin, chief justice;
Hon. A. M. Craig, justice;
Hon. B. D. Magruder, "
Hon. J. M. Bailey, "
Hon. D. J. Baker, "
Hon. J. J. Phillips, "
Hon. J. N. Carter, "

J. R. Ward, sheriff; Frank W. Havill, clerk.

Court opened by proclamation.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.]

Attest: FRANK W. HAVILL, *Clerk.*

2 Be it remembered that, to wit, on the 2nd day of May, A. D. 1895, there was filed in the office of the clerk of said supreme court a certain transcript of the record and proceedings had in the appellate court of the first district of the State of Illinois, together with the transcript of the record of the supreme court of Cook county, Illinois, wherein The Chemical National Bank of Chicago was appellant and Hartford Deposit Company was appellee. From the finding and judgment of said appellate court in said cause the said Chemical National bank appealed to the supreme court of Illinois, southern grand division, and brings here and files said transcripts, which *is* placed upon the docket of the said supreme court as follows, to wit:

CHEMICAL NATIONAL BANK OF CHICAGO, Appellant, *vs.* HARTFORD DEPOSIT COMPANY, Appellee. } Appeal from Appellate Court, 1st District.

The said transcript being in words and figures following, to wit:

3 *Cross-errors.*

Supreme Court of Illinois, Southern Grand Division.

CHEMICAL NATIONAL BANK OF CHICAGO *et al.*, Appellant, *vs.* HARTFORD DEPOSIT CO., Appellee.

Now comes the appellee, Hartford Deposit Co., by Burnham & Baldwin, its attorneys, and makes the following assignment of cross-error:

1. The appellate court erred in affirming the judgment of the trial court as to the receiver, Eli C. Tourtelot.
2. The appellate court erred in not giving judgment against the receiver, Eli C. Tourtelot.

BURNHAM & BALDWIN,
Attorneys for Appellee.

4 At a term of the appellate court begun and held at Chicago on Tuesday, the fifth day of March, in the year of our Lord one thousand eight hundred and ninety-five, within and for the first district of the State of Illinois.

Present: Hon. Arba N. Waterman, presiding justice.
" " Joseph E. Gary, justice.
" " Henry M. Shepard, justice.
Thomas G. McElligott, clerk; James Pease, sheriff.

Filed —— —, A. D. 189–.

—— ——
vs. } No. 5528. Appeal, Cook. Error to Cook.
—— ——.

Be it remembered that on the 14th day of March, A. D. 1895, it being one of the days of said March term, A. D. 1895, certain proceedings were had in said court and entered of record in words and figures following, to wit:

5 HARTFORD DEPOSIT CO.
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO *et al.* } 5528. Appeal, Superior.

This day came appellant, by its counsel, and moved the court for leave to file a reply brief in said cause within one week from this date, and the court, being fully advised in the premises, doth order that said motion be allowed.

And it is further ordered by the court that said cause be taken under advisement.

And afterwards, on the 4th day of April, A. D. 1895, the following proceedings were had and entered of record in said cause, to wit:

6 HARTFORD DEPOSIT COMPANY,
Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF Chicago and Eli C. Tourtelet, Receiver of the Chemical National Bank of Chicago, Appellees. } 5528. Appeal, Cook Superior.

On this day came again the said parties, and the court, having diligently examined and inspected, as well the record and proceed-

ings aforesaid as the matters and things therein assigned for error, and being now fully advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error; therefore it is ordered by the court that the judgment of the court below be reversed as to the bank and enter judgment here for the sum of nine thousand dollars against the said appellee, The Chemical National Bank of Chicago, but affirm the judgment as to Eli C. Tourtelot, the receiver.

7 And it is further ordered by the court that said appellant recover of and from the said appellees its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the 5th day of April, A. D. 1895, the following proceedings were had and entered of record in said cause, to wit:

HARTFORD DEPOSIT CO. *vs.* CHEMICAL NATIONAL BANK OF CHICAGO *et al.* } 5528. Appeal, Superior.

This day came appellees, by their counsel, and moved the court for an appeal from the order and judgment of this court to the supreme court of Illinois, and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the Chemical National Bank of Chicago to the southern grand division of said supreme court, without bond, as per stipulation filed herein.

8 I, Thomas G. McElligott, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 16th day of April, [SEAL.] in the year of our Lord one thousand eight hundred and ninety-five.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court of the First District.

9 Supreme Court of Illinois, Southern Grand Division, May Term, A. D. 1895.

CHEMICAL NATIONAL BANK OF CHICAGO, Appellant, *vs.* HARTFORD DEPOSIT COMPANY, Appellee. } Appeal from Appellate Court of First District.

And now comes the appellant, by Duncan & Gilbert, his attorneys, and says that in the record and proceedings of the court below in the above-entitled cause manifest error hath intervened in this:

First. The court below erred in not affirming the judgment of the superior court.

Second. The court below erred in reversing the judgment of the superior court.

Third. The court below erred in rendering judgment against appellant in manner and form as the same was rendered.

Whereupon for this and other errors apparent in the record the appellant prays that the judgment of the appellate court may be reversed, &c.

DUNCAN & GILBERT,
Att'ys for Appellant.

10 12. 10.

HARTFORD DEPOSIT CO.
vs.
CHEMICAL NATIONAL BANK *et al.*

Transcript.

Filed May 6, 1895.

FRANK W. HAVILL, *Clerk.*

Burnham & Baldwin.

11 UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Arthur H. Chetlain, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the seventh day, of January, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

Present: The Honorable Arthur H. Chetlain, judge of the superior court of Cook county; Jacob J. Kern, State's attorney; James Pease, sheriff of Cook county.

Attest: STEPHEN D. GRIFFIN, *Clerk.*

Be it remembered that heretofore, to wit, on the 18th day of April, in the year of our Lord one thousand eight hundred and ninety-four, there was filed in the office of the clerk of the superior court of Cook county a certain declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, May Term, A. D. 1894.

Hartford Deposit Company, a corporation duly organized, existing, and doing business under and by virtue of the laws of the State

of Illinois, plaintiff in this suit, by Burnham & Baldwin, its
12 attorneys, complains of the Chemical National Bank, a national bank organized and conducted in the city of Chicago, in the county of Cook and State of Illinois, under the national banking act, and Eli C. Tourtelot, receiver, defendants in this suit, summoned, etc., of a plea of trespass on the case on promises.

For that whereas the said defendants heretofore, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and ninety-two, at Chicago, Illinois, to wit, at the county aforesaid, became and are indebted to the said plaintiff in the sum of fifteen thousand (15,000) dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendants and at the special instance and request of the said defendants, and, being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested;

And whereas, also, the said defendants afterwards, to wit, on the same day and year, at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendants should be thereunto afterwards requested; and the said plaintiff
aver- that the said goods, wares, and merchandise last men-
13 tioned at the time of the sale and delivery thereof were reasonably worth the further sum of fifteen thousand (15,000) dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year and at the place aforesaid, had notice;

And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, became and are indebted to the said plaintiff in the further sum of fifteen thousand (15,000) dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiff to the said defendants and at the like request of the said defendants, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff, and in the like sum for the price and value of

work then done and material for the same provided by the said plaintiff for the said defendants and at the like special request
14 of the said defendants, and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested;

And whereas, also, the said defendants, to wit, on the day and year last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there found to be in arrear and indebted to the said plaintiff in the further sum of fifteen thousand (15,000) dollars of like lawful money as aforesaid, and, being so found in arrear and indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested:

Nevertheless the said defendants (although often requested, etc.) have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff; but to pay the same or any part thereof to the said plaintiff has hitherto altogether refused and still do refuse, to the damage of the said plaintiff of fifteen thousand (15,000) dollars, and therefore the said plaintiff brings suit, etc.

BURNHAM & BALDWIN,
Plaintiff's Attorney.

15 *Copy of Account Sued On.*

Chemical National Bank and Eli C. Tourtelot to Hartford Deposit Company, Dr.

To goods, wares, and merchandise sold and delivered....	$15,000
To money lent and advanced.....	15,000
To money paid, laid out, and expended.....	15,000
To money had and received to and for the use of said plaintiff.....	15,000
To money due for interest and forbearance.....	15,000
To labor, service, and material.....	15,000
To balance due on account stated.....	15,000

Plaintiff's Affidavit of Amount Due.

Superior Court of Cook County, May Term, A. D. 1894.

HARTFORD DEPOSIT COMPANY, a Corporation, etc., }
vs.
CHEMICAL NATIONAL BANK and ELI C. TOURTELOT, Receiver. }

STATE OF ILLINOIS, }
County of Cook, } *ss.:*

Oscar F. Lindrooth, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for rent due and unpaid from said Chemical National bank under its lease from the Hartford Deposit Company for the premises known as the bank floor of the Hartford building, in the city of Chicago, in said county, and that there is due to the plaintiff from the defendants, after allowing to them all just credits, deductions, and set-offs, the sum of nine thousand two hundred and ninety (9,290) dollars and thirty-two (32) dollars.

OSCAR T. LINDROOTH.

[SEAL.] Subscribed and sworn to before me this 18th day of April, 1894.

JOHN R. SYNNESTVEDT,
Notary Public.

And on the day and year last aforesaid, to wit, the 18th day of April, A. D. 1894, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures as follows, to wit:

STATE OF ILLINOIS, }
Cook County, } *ss.:*

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon The Chemical National Bank and Eli C. Tourtelot, receiver, if they shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof, to be holden in the court-house, in the city of Chicago, in said Cook county, on the first Monday of May next, to answer unto Hartford Deposit Company, a corporation, in a plea of trespass on the case upon promises to the damage of said plaintiff, as it is said, in the sum of fifteen thousand dollars; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

17 Witness Stephen D. Griffin, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 18th day of April, A. D. 1894.

[SEAL.] STEPHEN D. GRIFFIN, *Clerk.*

P'd, 1.60.
" M., .60.

Served this writ on the within-named defendant, Eli C. Tourtelot, receiver, by reading the same to him, this 18th day of April, 1894.

JAMES H. GILBERT, *Sheriff,*
By FRANK SACK, *Deputy.*

Served this writ on the within-named defendant, The Chemical National Bank, by delivering a true copy thereof to J. O. Curry, president of said bank, this 23rd day of April, 1894.

JAMES H. GILBERT, *Sheriff.*
By FRANK SACK, *Deputy.*

And afterwards, to wit, on the 30th day of April, A. D. 1894, there was filed in the office of the clerk of said court a certain appearance, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss :
Cook County, }

In the Superior Court, May Term, 1894.

HARTFORD DEPOSIT COMPANY }
vs.
CHEMICAL NATIONAL BANK and ELI C. TOURTELOT, Rec'v'r. }

We hereby enter the appearance of The Chemical National Bank and of Eli C. Tourtelot, receiver, and also of ourselves as attorneys for said defendants in the above-entitled cause.

April 3d, 1894.

DUNCAN & GILBERT.

18 And afterwards, to wit, on the 7th day of May, A. D. 1894, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss :
Cook County, }

Superior Court Thereof, May Term, A. D. 1894.

THE CHEMICAL NATIONAL BANK OF CHICAGO and E. C. Tourtelot, Receiver of The Chemical National Bank of Chicago, } Assumpsit.
ats.
THE HARTFORD DEPOSIT COMPANY. }

And the defendants, by Duncan & Gilbert, their attorneys, come and defend the wrong and injury when, &c., and say that they did

not undertake or promise in manner and form as the plaintiff as above thereof complained against them; and of this they put themselves upon the country, &c.

DUNCAN & GILBERT,
Defendants' Attorneys.

STATE OF ILLINOIS, } ss:
Cook County, }

C. E. Tourtelot, being duly sworn, on his oath deposes and says that he is the receiver of the Chemical National Bank of Chicago and one of the defendants in the above-entitled cause, and that he verily believes that said defendants have a good defense to said suit upon the merits of the whole of the plaintiff's demand.

E. C. TOURTELOT.

Subscribed and sworn to before me this 7th day of May, A. D. 1894.

[SEAL.] STALHAM L. WILLIAMS, JR.,
Notary Public.

19 And afterwards, to wit, on the 28th day of January, A. D. 1895, the same being one of the days of the January term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

HARTFORD DEPOSIT COMPANY *vs.* CHEMICAL NATIONAL BANK and E. C. TOURTELOT, Receiver.	157,516.	Assumpsit.

MONDAY, *January 28th*, 1895.

This day come the parties, by their attorneys, and thereupon, by agreement of the parties, a trial by jury is waived and the cause is submitted to the court for trial, and the court, having heard the arguments of counsel and being now fully advised in the premises, finds the issues joined in favor of the defendants; and it is therefore considered by the court that the plaintiff take nothing by its suit, and that the defendants have and recover of the plaintiff their costs in this behalf expended, and that they have execution therefor.

Thereupon the plaintiff prays an appeal herein to the appellate court of the first district, which, by consent and agreement of the defendants, is allowed without bond, and thirty days is allowed the plaintiff to prepare and tender its bill of exceptions herein.

And afterwards, to wit, on the 7th day of February, A. D. 1895, there was filed in the office of the clerk of said court a certain bill of exceptions, which is in words and figures as follows, to wit:

20 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, June Term, A. D. 1894.

HARTFORD DEPOSIT COMPANY
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO and ELI C. Tourtelot, as Receiver of the Chemical National Bank of Chicago. } Assumpsit.

Be it remembered that on the trial of this cause in this term, a trial by jury having been waived, the cause was submitted to the court upon the following stipulation as to the facts, agreed to and signed by both parties to said suit, by their respective attorneys:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court Thereof, June Term, A. D. 1894.

THE HARTFORD DEPOSIT COMPANY
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO and ELIE C. Tourtelot, as Receiver of the Chemical National Bank of Chicago. } Assumpsit.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that a trial by jury thereof shall be waived, and that said cause shall be submitted to the court for trial upon the following facts, which, for the purposes of said trial, are admitted to be true:

The Chemical National Bank of Chicago was duly organized as a national banking association under the laws of the United States and duly authorized to commence the business of banking on the 15th day of December, A. D. 1891, and thereupon commenced the business of banking under the laws of the United States and
21 continued to carry on said business of banking until the 8th day of May, A. D. 1893, as hereinafter stated.

Subsequently and on the 18th day of November, A. D. 1892, said Chemical National Bank of Chicago entered into an agreement in writing, commonly called a lease, with The Hartford Deposit Company, the plaintiff in this cause, a corporation duly organized under the laws of the State of Illinois; which said lease was and is in the words and figures following, to wit:

22 *Lease.*

This indenture, made this eighteenth day of November in the year of our Lord eighteen hundred and ninety-
Parties. two, between the Hartford Deposit Company, of Chicago, in the county of Cook, in the State of

Illinois, party of the first part, and Chemical National bank, of the city of Chicago, in the county of Cook, in the State of Illinois, party of the second part.

Witnesseth, that the said Hartford Deposit Company, in consideration of the covenants and agreements herein contained on the part of the said party of the second part, and its successors and assigns, to be kept and performed, doth by these presents grant, demise and lease unto the said party of the second part, its successors and assigns (such assigns being with the license hereinafter mentioned) one certain room in the building known as Nos. 134, 136, 138, 140, 142, 144, and 146 Dearborn street, in said Chicago, to wit: the banking-room occupying practically the entire second floor of said building, as shown on the plans and specifications of said second floor, now in the office of Henry Ives Cobb, architect; said premises to be occupied by said Chemical National bank, for the uses and purposes of a banking-house, and for no other purpose.

Description of premises.

To have and to hold the premises hereby demised, with the rights, easements, and appurtenances thereto belonging, unto the said party of the second part, its successors and assigns (such assigns being with the license hereinafter mentioned) from the first day of May now next including said day, during the full term of five years thence next ensuing, viz: until the thirtieth day of April, A. D. 1898.

Term.

Yielding and paying therefor during the said term (except only in case of fire or other casualty, as hereinafter mentioned) as follows, to wit: unto the said Hartford Deposit Company, its successors and assigns, the sum of sixty-two thousand five hundred dollars ($62,500), twenty five hundred dollars at the execution and delivery of this lease and the remainder such yearly rent to be payable monthly, in advance, in equal monthly portions, to wit: one thousand dollars ($1,000) on the first day of each month in said term, the first monthly payment to be made on the first day of May, now next; and the said rent shall be paid at the office of the Hartford Deposit Company, or such its agent in Chicago as the secretary of the Hartford Deposit Company may from time to time in writing designate; and the option is hereby expressly given to said Chemical National bank for a further term of five years from May 1st, 1898, at an annual rental of fifteen thousand dollars ($15,000) per annum, provided said bank shall have notified said Hartford Deposit Company on or before February 1st, 1898, of its election to take such further term.

23 Rent reserved.

Place of payment.

24 It is expressly understood and agreed by and between the parties hereto, that it shall not be necessary in any event, for the lessor, or its agent, successors, or assigns, to go elsewhere than at the place above specified for the payment of the same.

And the said lessor agrees to pay the water rates, and to furnish

Lessor to furnish water and steam heating.

at its own expense the steam for the steam-heating apparatus in said premises, when necessary, from October to May, both inclusive, from seven o'clock a. m., to six o'clock p. m., (Sundays and legal holidays excepted) but it shall not be liable for damages for unavoidable delay in so doing.

And the said lessee, for itself, its successors and assigns, hereby covenants and agrees with the said Hartford Deposit Company, its successors and assigns, that the said lessee, its successors and assigns, will during the said term or any portion thereof, and for such further time as it, or any person claiming under it, shall hold the said premises or any part thereof, pay unto it the said yearly rent, as aforesaid, except only in case of fire or other casualty, as hereinafter mentioned; and also will keep all and singular the said premises in such repair as the same are in at the commencement of said term, or may be put in by the lessor or its representatives, during the continuance thereof, reasonable use and wearing thereof, and damages accidental, fire or other inevitable accidents, excepted.

Lessee to restore premises in good repair.

And the said lessee, for itself, its successors and assigns, hereby covenants and agrees with the said Hartford Deposit Company, its successors and assigns, to restore the premises to the lessor, with the glass of like quality in the several windows thereof, entire and unbroken; and will not allow any waste of the water, or misuse or neglect of the water fixtures, or steam-heating apparatus on the premises, and that it will pay all damages to the demised premises caused thereby; and will indemnify and save harmless the lessor, its successors and assigns, from all claims for damage done to any goods, merchandise or personal property, by such water, or by such misuse or neglect; and that all personal property in the demised premises shall be at the risk of the lessee only; and if the whole, or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the leakage or bursting of water pipes, or by the steam-heating apparatus, or in any other way or manner, no part of said loss or damage is to be charged to, or be borne by, the lessor, its successors or assigns, in any case whatever.

Lessee's property on premises at his own risk.

And further, that it, or others having its estate in the premises, will not assign this lease, or underlet the whole or any part of the said premises, without the written assent of the said Hartford Deposit Company, its successors or assigns, first had and obtained therefor; and that no express or implied assent by the party of the first part to the assignment of the lease, or to the underletting of any part of said premises, shall be deemed or taken to authorize any subsequent or other assignment or subletting, but written assent, as aforesaid, shall be essential in each separate case of proposed assignment or subletting, but such

In regard to assignment or subletting.

assent shall not be withheld when the proposed subtenant and his business are objectionable.

26 And it is further expressly understood and agreed between the said parties, that in case the said party of the second part shall abandon said premises, or any part thereof, during the continuance of said term, the said party of the first part may, at its option, without notice, and either in its own name or as the agent of the said party of the second part, relet said premises, or any part thereof, on such terms and for such rent as it may deem expedient or proper and such reletting shall not operate as a waiver of any right whatever which the said party of the first part would otherwise have to hold the said party of the second part responsible for the rent above reserved; and in case said premises, or any part thereof, shall be relet, as aforesaid, the said party of the first part shall collect the rent therefor from the person or persons to whom the same shall be relet, and after paying the expenses of such reletting and collection, apply what remains of the amount received by it on account of the rent due, or to become due, from the said party of the second part, under this lease.

And further that no steam engine or boiler shall be put on the premises; and no alterations or additions shall be made during the term aforesaid in or to the same; that no additional lock shall be put upon any door of said rooms without the consent of the lessor being first obtained in writing allowing the same, and any and all locks placed on any door shall remain to the benefit of the lessor, and that it will at the termination of its estate in the premises, return all keys of said rooms, and of the water-closets, and will give to the lessor or its agent, the explanation to the combination

27 of all locks on the doors of the vaults, and will not permit any duplicate keys to be made (the lessor to furnish all necessary keys), and that it, the said lessee, its executors, successors and assigns, will not injure, overload, or deface the said building, or permit the same, or any part thereof, to be injured, defaced, or overloaded, and that it will not at any time during the said term, permit, or suffer to be used, exercised or carried on upon said premises, any noisome, noxious, noisy or offensive trade or business, or occupy or use said premises, or permit said premises to be occupied or used, at night, or as a lodging, or for any immoral or illegal purpose; and that it shall be lawful for the said lessor or its agent, at all times to enter or send its agent, mechanics or servants into and upon the same, to examine the condition thereof, and to examine, maintain, repair or protect any and all things pertaining to said premises; and that no signs shall be attached to said building by drilling into the stone or iron work, or by fastening into the joints of the same, and that no signs shall be put up, fastened or painted upon said building, or in the halls, stairways or entrances (except opposite the respective numbers on the bulletin-boards provided for that purpose, or on the glass in the

Covenants as to locks, keys, vault combinations, signs, moving of heavy articles, use of premises, enjoyment of janitor and rules of the building.

doors, and the glass of the windows of said demised premises), without the consent of the first party being first obtained in writing, and all signs shall be made in gold or silver leaf lettering, and both in size, style of lettering and material, under written instructions of the lessor or its agent, and shall first be approved by the party of the first part before being put up; and that the said party of the second part will not suffer any rubbish, ashes,
28 dirt or filth to be thrown into the halls, courts, areas or privies of said building, or out of the windows, nor into the street in front of said building, and no dirt, ashes stoves or furniture, or other article shall be left in the halls of said building; and that in the care of said rooms, no person other than the janitor of the building, or his assistant, shall be employed, to be paid by the lessee; that all safes, furniture, boxes, or other bulky articles for said rooms shall be carried up the stairs of said building before nine o'clock a. m. or after five o'clock p. m., and that the said lessee will pay all damages to said premises, staircases and halls caused by any such moving of heavy or bulky articles as aforesaid; and that during said term it will conform to all reasonable regulations made by the lessor, its successors or assigns for the government of said building; and that the lessor, or its representative, may place on the front of said building a notice "For rent" for three months prior to the termination of this lease; and that the janitor of said building shall at all times keep a pass-key, and be allowed admittance to said room.

Covenants against use of stoves, kerosene, etc.

And further that it, or others having its estate in said premises, will not use burning fluid, camphene, alcohol, kerosene, or anything except gas or electricity in lighting said premises, and will not put up or use any stove without the consent of the lessor, and that all stoves used in said demised premises shall be placed on a zinc platform or plate of zinc, at least three feet square, and when any stove shall be placed nearer any wood-work than three feet, such wood-work shall be cased with zinc at least three and a half feet high and three feet wide; and that he will not invali-

Extra insurance risk.

29 date any policies of insurance now or hereafter made on said building, and that he will pay all extra insurance on said building, if any is required on account of extra risk in the use of the demised premises.

It is further agreed that the lessee and its successors and assigns shall and will, at the expiration of said term, or other termination of the lessee's estate in the premises, peaceably

Covenants to surrender peaceable possession, and in good repair.

yield and give up unto the said lessor, or its successors or assigns, all and singular the premises, and all fixtures and future erections and additions to or upon the same, except such fixtures as have been put in by said bank as a part of the office furniture and fixtures, in good, tenantable repair

in all respects, reasonable wearing and use thereof and damage by fire or other inevitable accidents excepted;

Provided always, and these presents are upon this condition, that if the lessee, or its representatives or assigns, do or shall neglect or fail to perform and observe any or either of the covenants hereinbefore contained, which on its part are to be performed, the said lessor, its successors or assigns, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into or upon said premises, and repossess the same as of its former estate, and expel the said lessee, and those claiming under it, and remove its effects (forcibly if necessary), without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenant, and if by virtue of any statute or statutes for the relief of insolvent debtors, and the more equal distribution of their effects, or by virtue of any act to establish a uniform system of bankruptcy throughout the United States, or of any insolvent law or bankrupt law, a warrant shall be issued against the estate or estates of the lessee, or of those having estate in the premises (either upon its petition, or upon that of any creditor), or if it shall become insolvent, or shall make an assignment for the benefit of its creditors, or if the term named in this lease shall be attached, or taken on execution, the lessor, its successors or assigns, may in like manner enter and repossess the premises, and expel the lessee and those claiming under it, and remove its effects, and in any case in which such entry, expulsion and removal are lawful, under the provisions above set forth, such entry upon the premises, or upon any part thereof in the name of the whole (with or without such expulsion or removal), shall determine this lease; and provided also, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire or other casualty, so that the same shall thereby be rendered unfit for use or habitation, then and in such case, the lessor, its successors or assigns, may, at any time within fifteen days after the happening of such casualty, by notice in writing to the lessee, or those having its estate in the premises, determine this lease; and unless it be so determined, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been by the said lessor put in proper condition for use and habitation; but in any event the rent shall be paid up to and including the day of said fire or casualty.

Covenants as to re-entry and termination of lessee's interest by fire, etc.

30

31

The party of the second part hereby constitutes John B. Synnestvedt, or any attorney, to be its true and lawful attorney, irrevocably for it, and in its name, place and stead, to enter its appearance in any court of record, in term time or vacation, at any time after any rent is due under this lease, or after this lease is terminated by de-

Confession of judgment in forcible entry and detainer.

fault or otherwise, to waive process and services thereof, and trial by jury or otherwise, and confess a judgment in favor of the party of the first part for any rent due under the covenants of this lease and to waive all errors in entering up of such judgment, and to stipulate that no appeal or writ of error shall be prosecuted from the said judgment.

And the said party of the second part hereby makes, constitutes and appoints any attorney of any court of record to be its true and lawful attorney, irrevocably for it, and in its name, place and stead, to enter appearance in any court of record, or before any justice of the peace, at any time after any rent is due upon this lease, or after this lease is determined by default or otherwise, to waive process and service thereof, and trial by jury or otherwise, and confess a judgment of guilty of forcible detainer of the above-demised premises, or any part thereof, and for costs of suit, in favor of said Hartford Deposit Company, its successors and assigns, and to release all errors that may occur or intervene in such proceeding, and particularly in the waiving of process and service thereof, and trial by jury, or otherwise, and in the entering up of said judgment, and the issuing of the writ of restitution thereon, and to stipulate that
32 no writ of error or appeal shall be prosecuted from said judgment, nor any bill in equity filed, nor any proceeding of any kind taken in law or equity, to interfere in any manner with the operation of said judgment, or the writ of restitution issued thereon, and to consent that a writ of restitution may be immediately issued upon said judgment.

And it is further covenanted by and between the parties that the party of the second part shall pay and discharge all costs and attorneys' fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part, its heirs or assigns.

Lessee covenants to pay attorneys' fees.

It is understood, stipulated, and agreed that the paragraph on back of within lease, referring to boxes in public vault, is part of this lease.

In witness whereof, the said parties of the first and second parts have hereunto, interchangeably, set their hands and seals, the day and year first above written.

HARTFORD DEPOSIT COMPANY,
By E. V. JOHNSON, *President.*

[L. S.] HUGH L. BURNHAM, *Secretary.*

CHEMICAL NATIONAL BANK,
By J. O. CURRY, *President.*

Attest:
[L. S.] G. E. HOPKINS,
Assistant Cashier.

In consideration that the above written lease was executed and delivered to the above-named lessee at — request, and
Guaranty. in further consideration of one dollar by — received of the above-named lessor, — hereby guarantee to the said lessor, its successors and assigns, the performance by the said lessee, — executors, administrators, and assigns, of all the
33 agreements and covenants in the said lease contained by the said lessee, — executors, administrators, and assigns, to be kept and performed.

—— —, 189–.

—— ——.

Assignment of Lease.

For value received — hereby assign all — right, title, and interest in and to the within lease unto — heirs and assigns.

Witness — hand and seal this — day of ——, A. D. 189–.

—— ——. [SEAL.]
—— ——. [SEAL.]

Acceptance.

In consideration of the above assignment and the written consent of the first party thereto — hereby assume and agree to make all the payments and perform all the covenants and conditions of the foregoing lease by the said party of the second part to be made and performed.

Witness — hand and seal this — day of ——, A. D. 189–.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

34 —, —— ——, hereby consent to the assignment of the foregoing lease to —— —— on the express condition that no further assignment of said lease or subletting of the premises or any part thereof shall be made without — written assent first had thereto.

Witness — hand and seal this — day of ——, A. D. 189–.

—— ——. [SEAL.]

35 (On back of lease.)

It is understood that the lessee shall pay five ($5.00) dollars for box No. 1 in the public vault on basement floor, this sum to be paid annually during the continuance of the within lease. Further, that the box shall be surrendered on the termination of this lease, either by limitation or otherwise, as herein provided, but it is expressly understood and agreed that this vault is proof against fire only, and that the lessor shall not be responsible for any loss incurred through use of same, and it shall be at liberty to take forcible possession ten days after the termination of this lease, either by limitation or otherwise, as herein provided.

9115. (Copy.) No. —. Lease. Hartford Deposit Company to Chemical National bank Banking-room on second floor in the building 134, 136, 138, 140, 142, 144, & 146 Dearborn St. From May 1st, 1893, to April 30th, 1898. Amount per annum, $12,000.00; on delivery of lease, 2,500.00; amount per month, $1,000.00. Payable in advance 1st of every month, beginning May 1st, 1893.

Received the within-named twenty-five hundred dollars at
36 the time of the delivery hereof, same being the first payment on account of rent.

HARTFORD DEPOSIT CO.,
By HUGH L. BURNHAM, *Sec'y.*

Dated Dec. 6,'92.

37 Afterwards and on or about the 1st day of May, A. D. 1893, said Chemical National Bank of Chicago took possession under said lease of the rooms to it thereby demised and continued to retain possession thereof under said lease until the 9th day of May, A. D. 1893, on which last-mentioned date said Chemical National Bank of Chicago, having become insolvent, suspended business and the paymant of its obligations, and said rooms and the assets of said Chemical National Bank of Chicago were taken possession of by a national bank examiner under the direction of the Comptroller of the Currency of the United States, and said national bank examiner retained possession of said rooms and of said assets until the 21st day of July, A. D. 1893, on which last-mentioned date said national bank examiner delivered possession of said rooms and said assets to John P. Hopkins, as receiver of said Chemical National Bank of Chicago, who had on said date been duly appointed as such receiver by the Comptroller of the Currency of the United States under and in pursuance of the laws of the United States, and said John P. Hopkins, as receiver as aforesaid, retained possession of said rooms until the 31st day of July, A. D. 1893, on which date he abandoned the same, as hereinafter stated.

On the 27th day of July, A. D. 1893, said John P. Hopkins, as receiver as aforesaid, served upon said Hartford Deposit Company a notice in writing, and said John P. Hopkins, as receiver as aforesaid, and said Hartford Deposit Company entered into a stipulation in writing; which said notice and stipulation were and are in the words and figures following respectively, to wit:

"CHICAGO, ILL., *July 27th*, 1893.

Hartford Deposit Company:

You are hereby notified that I have been appointed by the Comptroller of the Currency receiver of the Chemical National
38 Bank of Chicago, and that as such receiver I have elected to terminate the lease entered into by said Chemical National Bank of Chicago with the Hartford Deposit Company, dated November 18, 1892, and conveying for a period of five years from May 1, 1893, the second floor of the building known as numbers 134, 136, 138, 140, 142, 144, and 146 Dearborn street, in the city of Chicago, county of Cook and State of Illinois. I shall vacate said premises

on the 31st day of July, 1893, after which time, so far as I as receiver am concerned, said lease will be terminated.

(Signed) JOHN P. HOPKINS,
Receiver of the Chemical National Bank of Chicago."

"It is hereby stipulated and agreed by and between the parties hereto that the furniture and fixtures of the Chemical National Bank of Chicago, now in the second story of the Hartford Deposit Company building at 134 to 136 Dearborn street, Chicago, Illinois, may remain on said second story until said deposit company shall notify John P. Hopkins, receiver of said Chemical National Bank of Chicago, to remove the same, on the express understanding, however, that said Hartford Deposit Company shall have all of the rights, but no other rights against said receiver, against the Chemical National Bank of Chicago, and against the stockholders of the Chemical National Bank of Chicago, and against each the receiver, said bank, and said stockholders that it would have in case the receiver was to actually remove said furniture from said second story on the 31st day of July, A. D. 1893.

(Signed) JOHN P. HOPKINS.
THE HARTFORD DEPOSIT COMPANY,
By E. V. JOHNSON, *Its President.*

Attest: HUGH L. BURNHAM, *Sec'y.*"

39 In accordance with said notice, said John P. Hopkins, as receiver as aforesaid, abandoned possession of said rooms on the 31st day of July, A. D. 1893.

In pursuance of said stipulation the furniture and fixtures of said Chemical National Bank of Chicago remained in said rooms until the commencement of this suit.

On the 27th day of July, A. D. 1893, said John P. Hopkins, as receiver as aforesaid, paid to said Hartford Deposit Company the sum of two thousand seven hundred nine and $\frac{68}{100}$ ($2,709.68) dollars, being the total amount of rent due from said Chemical National Bank of Chicago and the said receiver to said Hartford Deposit Company under said lease down to and including the 31st day of July, A. D. 1893.

On the 15th day of January, A. D. 1894, said John P. Hopkins having resigned his office as receiver as aforesaid, said Elie C. Tourtelot was, by the Comptroller of the Currency of the United States, duly appointed receiver of said Chemical National Bank of Chicago, and entered upon the discharge of his duties as such receiver, and has ever since continued to act and is still acting as such receiver.

If, upon the foregoing facts, the court is of the opinion that the plaintiff is entitled to recover of the defendants or either of them judgment is to be rendered in favor of the plaintiff and against one or both of the defendants, as the case may be, said judgment to be in such form as the law may require and to be for such sum as the

court shall, from the foregoing facts, determine the plaintiff to be entitled to recover.

If, on the other hand, the court is of the opinion, upon the foregoing facts, the plaintiff is not entitled to recover of the defendants or either of them, judgment is to — rendered in favor of the defendants and against the plaintiff for costs of suit.

40 The foregoing was all the evidence introduced on the trial of this cause.

Upon which agreed statement of facts the court found that plaintiff was not entitled to recover of the defendants or of either of them, and thereupon gave final judgment against the plaintiff and in favor of the defendants; to which decision of the court the plaintiff, by its counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiff tenders this its bill of exceptions and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made, which is done accordingly this seventh day of February, A. D. 1895.

ARTHUR H. CHETLAIN, [SEAL.]
Judge of the Superior Court of Cook County.

It is hereby stipulated and agreed by and between the parties hereto that the clerk, in making up the transcript of the record to be filed in the appellate court, may incorporate this original bill of exceptions instead of making a copy thereof.

DUNCAN & GILBERT,
Attorneys for Defendants.
BURNHAM & BALDWIN,
Attorneys for Plaintiff.

The foregoing bill of exceptions is correct.

DUNCAN & GILBERT,
For Defendants.

41 Gen. No., 157,516. Term No., —. Appellate court, first district Illinois. Hartford Deposit Company, appellant, *vs.* The Chemical National Bank of Chicago, appellee. Bill of exceptions. Filed Feb. 7, 1895. S. D. Griffin, clerk. Burnham & Baldwin, attorneys for appellants.

42 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Stephen D. Griffin, clerk of the superior court of Cook county, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record, except the bill of exceptions, the original of which is by stipulation of the parties incorporated herein and made a part hereof, in a certain cause lately pending in said court on the law side thereof, wherein Hartford Deposit Company was plaintiff and Chemical National Bank *et al.* defendants.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, this 13th day of February, A. D. 1895.

STEPHEN D. GRIFFIN, *Clerk.*

$2 paid by Burnham & B.

43 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Appellate Court, First District.

HARTFORD DEPOSIT COMPANY, Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO and ELI C. TOURTELOT, as Receiver of the Chemical National Bank of Chicago, Appellees.

Assignment of Errors.

Now comes the appellant, Hartford Deposit Company, by Burnham & Baldwin, its attorneys, and makes the following assignment of errors:

First. The court erred in giving judgment against the plaintiff.

Second. The court erred in giving judgment in favor of the defendants.

BURNHAM & BALDWIN,
Attorneys for Appellant.

44 In the Appellate Court, First District Illinois.

HARTFORD DEPOSIT CO., Appellant,
vs.
THE CHEMICAL NATIONAL BANK OF CHICAGO *et al.*, Appellees.
No. 5528. Appeal, Cook Superior.

I, Thomas J. McEiligott, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 14th day of February, A. D. 1895, by said appellant.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal of said court, at Chicago, this 29th day of April, A. D. 1895.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court, First District Illinois.

45 "A."

Term No., —. Gen. No., 5528.

In the Appellate Court, First Dist., Ill.

—— ——, Appellant,
vs.
—— ——, Appellee.

Filed — appellate court Feb. 14, 1895.
THOMAS G. McELLIGOTT, *Clerk.*

—— ——, appellant's att'y.

46 And afterwards, on the 9th day of May, 1895, the following proceedings were had in said cause and entered of record, to wit:

At a supreme court begun and held at Mt. Vernon on Tuesday, the 7th day of May, in the year of our Lord one thousand eight hundred and ninety-five, within and for the southern grand division of the State of Illinois, to wit, on Thursday, the 9th day of May, A. D. 1895.

Present: J. W. Wilkin, chief justice.
" A. M. Craig, associate justice.
" B. D. Magruder, associate justice.
" J. M. Bailey, associate justice.
" D. J. Baker, associate justice.
" J. J. Phillips, associate justice.
" J. N. Carter, associate justice.

CHEM. NAT. BANK OF CHICAGO
vs.
HARTFORD DEPOSIT CO. } No. 12. Appeal from App. Court.

On this day came the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rules or orders of the court for this term, and this cause coming now on to be heard, the appellant having entered motion to reverse the judgment and remand said cause, and for costs, and the appellee having entered motion to affirm the judgment herein and for costs and for *procedendo*, and said motion being taken under advisement for final hearing, and the clerk reporting to the court that said cause is now ready to be taken on the call of the docket, it is ordered by the court that this cause be now submitted upon the record,
47 abstracts, briefs, and arguments filed and to be filed herein under the rules or order of the court. It is further ordered by the court that this cause be now taken under advisement for final hearing.

And afterwards, to wit, on the 14th day of June, A. D. 1895, the following opinion was filed in said cause:

48 CHEMICAL NATIONAL BANK } .
vs. } 12. 10.
HARTFORD DEPOSIT CO. }

Opinion.

CRAIG, *J.:*

This was an action brought by the Hartford Deposit Company against the Chemical National Bank of Chicago and Eli C. Tourtelot, as receiver of the bank, to recover damages for a failure to pay rent alleged to be due under a written lease from Aug. 1st, 1893, to April 31st, 1894. The facts were agreed upon, and they are substantially stated in the opinion of the appellate court as follows:

"The Chemical National Bank of Chicago entered into a lease dated November 18, 1892, with the Hartford Deposit Company of a banking office of a certain building owned by the said Hartford Deposit Company. In accordance with its terms, the bank paid
$2,500 on the delivery of said lease. The term was for a
49 period of five years from May 1, 1893, at an annual rental of
$12,000, payable in equal monthly installments of $1,000 in advance, exclusive of and in addition to said first payment of $2,500. The bank entered into and took possession of said premises on May 1, 1893, the first day of said term, and the first installment of rent fell due and was payable on that day. This installment was not paid when due, nor had it or any part of it been paid when, on May 9, 1893, the bank became insolvent and a national bank examiner took possession of its assets and of said premises. On July 21st a receiver was duly appointed, and on July 27th he notified the Hartford Deposit Company of his election to terminate said lease after July 31st, 1893, so far as he, as receiver, was concerned. On the same day, namely, July 27th, said receiver paid to the Hartford Deposit Company the sum of $2,709.68, which was, as agreed, the ratable amount of rent due for the period May — to July 31st, inclusive. No other or further rent was paid under said lease by
any other person or at any other time. The premises re-
50 mained vacant until May 1, 1894, when they were relet at a reduced rental."

It will be observed that nothing was done by the lessor to terminate the lease. The receiver gave notice of his election to terminate the lease on July 31 so far as he, as receiver, was concerned. This action, however, on his part had no effect on the lease as respects its validity or binding force between the lessor and the Chemical National bank. There was a contract in writing existing between these parties which fixed their obligations and determined their rights and liabilities, and the receiver was clothed with no power to do any act which would impair the obligation of that contract. It may be conceded, as held in Fidelity Safe Deposit and Trust Co. *vs.* Armstrong, 35 Fed. Reporter, 367, if the charter of the Chemical National bank had been forfeited and the corporation dissolved by decree of a court of competent jurisdiction the lease might be regarded as terminated for the reason that after the dissolution of the

corporation no lessee existed; but such is not this case. No
51 proceeding has been instituted to forfeit the charter of the Chemical National bank and no decree dissolving the corporation has ever been rendered. It is, however, insisted that the appointment of a receiver of a national banking association by the Controller of the Currency on account of its insolvency amounts, for all practical purposes, to a dissolution of such association. The Controller of the Currency has such supervisory power over national banks and such only as has been conferred by the acts of Congress, and in determining the effect to be given to his action in the appointment of a receiver it is necessary to go to the statutes. If Congress intended that the mere act of appointing a receiver on the part of the controller should forfeit the charter of a national bank and work a dissolution of the corporation, surely that deliberate body would in the enactment of the law have used language indicating an intention of that character. The following sections of the acts of Congress have been cited in the brief as showing the authority of the controller to appoint receivers. Section 1 of the act of
52 Congress approved June 30, 1876 (Pratt's Digest, p. 120), provides as follows:

"That whenever any national banking association shall be dissolved and its rights, privileges, and franchises declared forfeited, as prescribed in section 5239 of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association and enforce the personal liability of the shareholders, as provided in section 5234 of said statutes." Section 5234 of the Revised Statutes of the United States (Pratt's Digest, p. 84) provides as follows:

"SECTION 5234. On becoming satisfied, as specified in sec-
53 tions 5226 and 5227, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real and personal property of such association on such terms as the court may direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so
54 made to the Treasurer of the United States, subject to the order of the comptroller."

There are certain other cases specified in secs. 5141, 5151, 5191, 5195, 5201, and 5205 of the national banking act under which a receiver may be appointed, but they have no special bearing on the question involved. We find nothing in any of the sections of the law wherein a receiver is authorized to be appointed which in the slightest degree indicates that an appointment should be treated, for any purpose whatever, as a dissolution of the corporation. When a receiver has been appointed the statute makes it his duty to proceed to close up such association. This is done by collecting all debts and obligations due the bank, enforce the personal liabilities of the stockholders, if necessary, and then pay off its liabilities. After a receiver has been appointed and entered upon the discharge of his duties the corporation has no authority to transact any new business. It cannot issue bills, receive deposits, make loans, or discount commercial paper; but after the receiver has collected the indebtedness due the bank and dis-
55 charged its liabilities the bank still exists as a corporation, and will continue to exist until dissolved by the judgment of a court or until its stockholders may voluntarily surrender its charter. Moreover, sec. 5239 points out the mode in which a charter of a national bank may be forfeited. That section is as follows:

"If the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency in his own name, before the association shall be declared dissolved."

If a judgment of a court is necessary to dissolve a corporation on the ground specified in the foregoing section, upon what prin-
56 ciple can a judgment be dispensed with when some other ground of forfeiture is relied upon? But, disregarding other reasons, a sufficient answer to the position of counsel is, the banking act nowhere provides that the appointment of a receiver shall work a dissolution of the charter of a banking association. It is not pretended that the appointment of a receiver for an ordinary corporation will operate as a dissolution of such a corporation, and in the absence of an act of Congress providing otherwise we perceive no reason why one rule should be applied to an insolvent national bank and a different rule applied to other insolvent corporations. In the absence of a statute or act of Congress all insolvent corporations should stand on the same footing. But it is said a claim to be entitled to be proven up and paid by dividends out of the assets of a national banking association in the hands of a receiver must be one which at the date of the suspension of the association was an existing demand, and the claim for rent under this lease is not such a demand. The lease executed between the bank and
57 appellee was a valid contract. The premises were leased for

a term of five years from May 1st, 1893, at $12,000 per annum, payable in monthly installments of $1,000 in advance. The bank went into the possession of the premises on the 1st day of May, 1893, and $1,000 was due on the rent on that day. The money was not paid, and there was then a breach of the contract for which an action might have been maintained, and this occurred nine days before insolvency. There is, therefore, no foundation for the position of counsel that the claim of appellee was not an existing demand at the time the bank suspended. The amount of damages may not have been as large on the 1st day of May, 1893, as at a later period, but on that date there was a breach of the contract and a right of action for such breach. Bank of Bethel *vs.* Pahquioque Bank, 14 Wall., 383, fully sustains the right of appellee to maintain the action. It is there, among other things, said:

" Express power to sue and be sued, complain, and defend in any court of law and equity is conferred on such association by
58 the eighth section of the act providing for their organization, and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for that purpose by virtue of the appointment of a receiver by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is anywhere in terms conferred upon the receiver nor upon the Comptroller of the Currency in any case except when he institues a suit to forfeit the rights, privileges, and franchises of the association, and in that case the provision is express that the suit shall be in his own name. Beyond doubt the appointment of a receiver supercedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, dis-
59 count any notes or bills, or otherwise prosecute the business of banking; but the corporate franchise of the association is not dissolved and the association, as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it and may deliver special deposits in its keeping to the rightful owners." See also White *vs.* Knox, 111 U. S., 784.

It is claimed by appellee that the court erred in not rendering judgment against the receiver as well as the bank. The purpose of this action was to establish the demand of appellee in a court of competent jurisdiction against the bank. The receiver was not a necessary party to this action, and, not being a proper party, it was not error to refuse judgment against him.

The judgment of the appellate court will be affirmed.

Affirmed.

60 Be it remembered that on the 14th day of June, A. D. 1895, the following order was made and entered of record in said cause:

STATE OF ILLINOIS, *ss:*

Supreme Court, Southern Grand Division.

At a supreme court begun and held at Mt. Vernon on the 1st Tuesday in the month of May, in the year of our Lord one thousand eight hundred and ninety-five, the same being the 7th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Present: Jacob W. Wilkin, chief justice.

And afterwards, to wit, on the 14th day of June, in the year of our Lord one thousand eight hundred and ninety-five, an order was made by said court in words and figures following, to wit:

CHEMICAL NATIONAL BANK OF CHICAGO, Appellant, *vs.* HARTFORD DEPOSIT COMPANY, Appellee. } No. 12. May T., 1895. Appeal from App. Court, 1st Dist.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error,
61 and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that the record is no error, therefore it is considered by the court that the motions heretofore made to reverse the judgment and remand said cause for a new trial be, and the same are, denied, and the motion heretofore made to affirm the judgment herein is allowed; and it is therefore ordered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for *procedendo* be allowed; and it is further considered by the court that the said appellee recover of and from the said appellant costs by *him* in this behalf expended and that *he* have execution therefor.

62 And afterwards, to wit, on July 19th, 1895, the following petition and order *was* filed and entered of record in said cause, to wit:

Supreme Court of Illinois, Southern Grand Division.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Appellant, *vs.* HARTFORD DEPOSIT COMPANY, Appellee. } Appeal from Appellate Court, First District.

To the honorable the chief justice of the supreme court of Illinois:

Your petitioner, The Chemical National Bank of Chicago, a national banking association organized under the laws of the

United States, respectfully represents unto your honor that a final judgment was entered in the above-entitled cause by the supreme court of the State of Iliinois, sitting in and for the southern grand division of said State, on or about the 14th day of June, A. D. 1895.

Your petitioner further represents that your petitioner in said cause claimed immunity from liability to the plaintiff in said cause in the trial court, being appellee in said supreme court, under sections 5234, 5235, and 5236 of the Revised Statutes of the United States and section 1 of an act of Congress authorizing the appointment of receivers of national banks, and for other purposes, approved June 30, 1876, and that the decison of the appellate court of the first district in said cause reversing the judgment and decision of the superior court of Cook county and entering judgment in favor of the plaintiff in said suit and against your petitioner and the decision of said supreme court affirming said judgment and decision
63 of said appellate court were against the immunity thus claimed by your petitioner.

Wherefore your petitioner prays that a writ of error may be allowed to have said record and proceedings reviewed by the Supreme Court of the United States, at Washington, in accordance with the statute in such case made and provided.

Respectfully submitted.

THE CHEMICAL NATIONAL BANK
OF CHICAGO.
DUNCAN & GILBERT, *Its Attorneys.*

Upon an examination of the above petition it is ordered that the prayer of the petition be allowed.

A. M. CRAIG,
Chief Justice.

Galesburg, Illinois, July 19th, 1895.

[Endorsed:] Supreme court, southern grand division. The Chemical National Bank of Chicago *vs.* Hartford Deposit Company. Petition for writ of errror. Filed July 20th, 1895. 'Frank W. Havill, clerk sup. ct.

64 Be it remembered that on, to wit, the 20th day of July, A. D. 1895, the following writ of error was filed in said cause:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said court between The Chemical National Bank of Chicago and Hartford Deposit Company, a manifest error hath happened, to the great damage of the said Chemical National Bank of Chicago, as by its complaint appears, and it being fit that the error, if any there has been, should

be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1895, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 20th day of July, in the year of our Lord one [SEAL.] thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth year.

S. W. BURNHAM,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. The Chemical National Bank of Chicago, plaintiff in error, *vs.* Hartford Deposit Company, defendant in error. Writ of error. Filed July 20th, 1895. Frank W. Havill, clerk sup. ct.

65 Be it remembered that on, to wit, the 20th day of July, A. D. 1895, the following citation was filed in said cause:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To Hartford Deposit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1895, pursuant to a writ of error, wherein you are defendant, filed in the clerk's office of the supreme court of Illinois for the southern grand division, and wherein The Chemical National Bank of Chicago are plaintiffs, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. M. Craig, chief justice of the supreme court of Illinois, this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

A. M. CRAIG,
Chief Justice.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I served the within citation on the within-named defendants in error by exhibiting the same to —— ——, attorney for said —— ——, on the — day of ——, A. D. 189–, and delivering to him a

true copy thereof, and by exhibiting the same to —— ——, attorney for —— ——, on the — day of ——, A. D. 189–, and delivering to him a true copy thereof, and by exhibiting the same to —— ——, and at the same time delivering to each of them a true copy thereof.

—— ——,

U. S. Marshal, Northern District of Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

—— ——, being first duly sworn, doth depose and say that he served the within citation on the within-named defendants in error by —— ——.

—— ——.

Subscribed and sworn to before me this — day of ——, 189–.

—— ——.

[Endorsed:] Supreme Court of the United States. The Chemical National Bank of Chicago, plaintiff in error, *vs.* Hartford Deposit Company, defendant in error. Citation to October term, 1895. Service of the within citation is accepted this 22d day of July, A. D. 1895. Charles H. Baldwin, Burnham & Baldwin, attorneys for defendant in error. Filed July 20th, 1895. Frank W. Havill, clerk sup. ct.

66 Be it remembered that on, to wit, July 20th, A. D. 1895, the following bond was filed in said cause:

Know all men by these presents that we, The Chemical National Bank of Chicago, by E. C. Tourtelot, its receiver, as principal, and Hiram T. Gilbert, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto Hartford Deposit Company, of said county and State, in the penal sum of one thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 20th day of July, A. D. 1895.

The condition of the above obligation is such that whereas the said Hartford Deposit Company did, on or about the 4th day of April, A. D. 1895, recover in the appellate court of the first district of Illinois a judgment against said The Chemical National Bank of Chicago for the sum of nine thousand dollars ($9,000) and costs of suit in a certain suit then pending in said court, wherein said Hartford Deposit Company was the appellant and said The Chemical National Bank of Chicago was the appellee, from which said judgment of said appellate court of the first district of Illinois the said The Chemical National Bank of Chicago prayed for and obtained an appeal to the supreme court of the State of Illinois; and

Whereas the said supreme court of the State of Illinois did after-

wards, on the 14th day of June, A. D. 1895, affirm the said judgment of said appellate court of the first district of Illinois and did render judgment against the above-bounded The Chemical
67 National Bank of Chicago for costs of suit; and

Whereas said The Chemical National Bank of Chicago has obtained a writ of error from the Supreme Court of the United States of America to said supreme court of Illinois to reverse the judgment in the aforesaid suit, and a citation directed to said Hartford Deposit Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the said obligation is such that if the said The Chemical National Bank of Chicago shall prosecute its said writ of error to effect and pay the costs to be rendered against it if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

THE CHEMICAL NAT. BANK
OF CHICAGO, [SEAL.]
By E. C. TOURTELOT, *Its Receiver.*
HIRAM T. GILBERT. [SEAL.]

Approved July 22d, 1895.
A. M. CRAIG, *C. J.*

[Endorsed:] Supreme Court of the United States. The Chemical National Bank of Chicago, plaintiff in error, *vs.* Hartford Deposit Company, defendant in error. Bond. Filed July 20th, 1895. Frank W. Havill, clerk sup. c't.

68 I, Frank W. Havill, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true, perfect, and complete transcript of the records of the appellate court of the first district of the State of Illinois and of the superior court of Cook county, Illinois, and a perfect and complete transcript of the record of proceedings of the supreme court of Illinois as truly taken and copied by me from the files and records now on file and of record in my office in a certain cause lately pending in the supreme court of Illinois, southern grand division, wherein The Chemical National Bank of Chicago was appellant and The Hartford Deposit Company was appellee.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Mt. Vernon, Illinois, this 30th day of July, A. D. 1895.

[Seal of the Supreme Court, State of Illinois, Aug. 26, 1818.]

FRANK W. HAVILL,
Clerk of the Supreme Court of Illinois.

69 Supreme Court of the United States, October Term, A. D. 1895.

THE CHEMICAL NATIONAL BANK OF CHICAGO, Plaintiff in Error, *v.* HARTFORD DEPOSIT COMPANY, Defendant in Error.	Error to Supreme Court of Illinois.

And now comes the plaintiff in error, by Hiram T. Gilbert, its attorney, and says that in the record and proceedings of the supreme court of Illinois in the above-entitled cause manifest error hath intervened to the prejudice of said plaintiff in error in this:

First. The supreme court of Illinois erred in affirming the judgment of the appellate court of the first district.

Second. The supreme court of Illinois erred in not reversing the judgment of the appellate court of the first district and in not affirming the judgment of the superior court of Cook county.

Third. The supreme court of Illinois erred in holding that under the agreed statement of facts in the record the plaintiff in error was liable to the defendant in error.

Wherefore, for these and other errors apparent in the record, the plaintiff in error prays that the judgment of the supreme court of Illinois may be reversed, &c.

HIRAM T. GILBERT,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 16,025. Illinois supreme court. Term No., 735. The Chemical National Bank of Chicago, plaintiff in error, *vs.* Hartford Deposit Company. Filed September 21st, 1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

GEORGE E. BELKNAP ET AL.

v.

GEORGE F. SCHILD.

No. 165.

Brief for Appellee.

This suit was brought by the appellee, Schild, against George E. Belknap, Joseph Feaster, C. C. Wolcott, and Jesse Diamond as private individuals. No mention is made in the bill of complaint of any official capacity in which they were acting. A plea in abatement was filed on behalf of the appellants (defendants in the court below) signed "John T. Carey, U. S. Att'y, for Defendants." In this plea it was alleged that the defendant Belknap was a commodore in the United States Navy and as such had charge of the United States navy yard at Mare Island, in the State of California; that the defendants Wolcott, Feaster, and Diamond were also in the service of the United States at said navy yard in the capacities of civil engineer, assistant naval constructor, and as employee of

the United States, respectively. It was further alleged that the "caisson-gate," which was charged to be an infringement of complainant's patent, was owned and operated by the United States at said Mare Island navy yard, and that whatever the defendants had done in connection with said caisson-gate was done by them as officers and employees in the service of the United States and not otherwise.

Subsequently the Attorney-General of the United States filed a "plea to the jurisdiction of the court." Said plea did not appear to have been taken on behalf of the defendants, but on behalf of the United States, and commences as follows: "And now comes the Attorney-General of the United States and suggests to the court, and gives it to understand and be informed (appearing only for the purpose of this motion), that the caisson-gate in controversy in this suit was planned and constructed by the United States, is now and for a long time past, to wit, ever since its construction, has been in the possession and use of the United States, and is now being operated at the dry-dock of said navy yard for naval purposes and the public defence." The said plea then proceeds to assert that the lower court had no jurisdiction over the subject of the controversy, for the reason that the said caisson-gate was the property of the United States, *and, expressly refusing to submit the rights of the United States to the jurisdiction of the court*, prayed that the bill might be dismissed. The said plea was signed "A. H. Garland, Attorney-General of the United States, by John T. Carey, United States attorney."

Both pleas were overruled, and the same defences were afterwards interposed by answer.

Upon this appeal a brief has been filed entitled "Brief for Appellants." It is signed "Holmes Conrad, As-

sistant Attorney-General." No formal appearance has been entered by any attorney as *counsel for appellants.* The only appearance entered is by the Assistant Attorney-General on behalf of the United States. We seriously doubt whether there is any appearance in this court on behalf of the appellants such as is provided for by the rules of the court. Indeed, the only appearance that there appears to be in that regard is an appearance on behalf of the United States through its Assistant Attorney-General. The brief which he has filed is a brief practically in behalf of the United States, the main contention of which is that the caisson-gate in question cannot be interfered with, on the ground that it is property of the United States. We therefore might very properly ask that the decree appealed from be affirmed on the ground that the appeal is being prosecuted, not by any one who is a party to the record, but by the United States, who is not a party to the record and who *expressly refused to submit itself to the jurisdiction of the lower court.* We understand that intimations of this kind have been thrown out by this court in several cases of a similar import, and if this court should be of opinion that the point is well taken, we submit that the decree appealed from should be affirmed without an inquiry into the merits, on the ground that the appeal here is not prosecuted by any party to the record.

Argument.

I.

The first point made by the Attorney-General is that the appeal should have been dismissed because *the infringing device was the property of the United States, constructed by the United States, and was in the control of its*

officers, being used only for the public purposes of the United States, and that an injunction would not lie against such officers to restrain them from the performance of their official duties in using the said infringing device.

The gist of this defence is that when officers of the United States use an infringing device, under order and authority from one of the Departments of the Government, they cannot be reached by injunction. In other words, the contention is that the Government of the United States, or any of its executive departments, may authorize the officers and agents of the United States to infringe a patent belonging to a private individual with impunity and they cannot be reached by any restraining orders from the courts.

We take it, however, that the following propositions are settled beyond controversy, namely:

1. That the right secured to a patentee by letters patent of the United States is a right of property.

2. That said property is as much entitled to the protection of the laws as any other species of property.

3. That said property cannot be interfered with or taken for public uses by the Government without the consent of the patentee any more than any other species of property can.

4. That the Government cannot authorize any of its subordinate officers or agents to interfere with or take such property without the consent of the patentee.

It follows as a conclusion from the foregoing premises that if the Government should authorize any of its officers or agents to interfere with or take such property without the consent of the patentee, and if said officers in pursuance of said direction should interfere with or take said property without the consent of the patentee, they are liable to be enjoined therefrom as trespassers, and

their position as public officers is no defence to such a suit.

This would appear to be conclusively settled by this court in the case of *U. S.* v. *Lee* (106 U. S. 196) and the numerous cases thereunder cited and referred to, and the subsequent cases of similar import. In addition thereto we also refer to the following authorities:

3 *Robinson on Patents*, section 910.
Cammyer v. *Newton*, 94 U. S. 225.
U. S. v. *Burns*, 12 Wall. 246.
James v. *Campbell*, 104 U. S. 59.
Hollister v. *Benedict*, 113 U. S. 59.
U. S. v. *Palmer*, 128 U. S. 262.
Palmer v. *U. S.*, 20 Ct. Cl. 432.
Campbell v. *James*, 2 Fed. Rep. 338.
Forehand v. *Porter*, 15 Fed. Rep. 256.
Colgate v. *International Oceanic Telegraphic Company*, 4 B. & A. 609.

Head v. Porter
48 Fed. R. 481

In Hollister *v.* Benedict (113 U. S. 67) Mr. Justice Matthews, speaking for this court, said:

"It was authoritatively declared in *James* v. *Campbell*, 104 U. S. 356, that the right of the patentee under letters patent for an invention granted by the United States was exclusive of the Government of the United States as well as of all others, and stood on the footing of all other property, the right to which was clear as against the Government by the constitutional guaranty which prohibits the taking of private property for public use without compensation."

In Cammeyer *v.* Newton (94 U. S. 226), Mr. Justice Clifford, speaking for this court, said:

"Section 22 of the patent act provides that every patent shall contain a grant to the patentee, his heirs and

assigns, for the term of 17 years of the exclusive right to make, use, and vend the said invention or discovery throughout the United States. Agents of the public have no more right to take such private property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this court in which it is held that the Government cannot, after the patent is issued, make use of the improvement any more than a private individual without license of the inventor or making him compensation. U. S. *v.* Burns, 12 Wall. 246."

Mr. Robinson in his work on patents, volume 3, section 910, sums up the law as follows:

"Even the Government of the United States, from whom the patent emanates, cannot grant to others the right to practise the invention, nor itself employ it without the permission of the patentee."

But, irrespective of the above authorities, we submit that the question is conclusively settled by the decision of this court in *United States* v. *Lee* (106 U. S. 196). That case holds that when an officer of the Government is sued in ejectment, it is no defence to set up that he holds the property in his capacity as an officer or agent of the Government, but that he must go further and show that the authority from the Government, by virtue of which he holds the property, is a lawful authority—that is to say, he must show that the Government has right and title to said property, and as the owner thereof put him in possession and authorized him to hold it.

This doctrine was subsequently affirmed in *Stanley* v. *Schwalby* (147 U. S. 518), *In Re Ayres* (123 U. S. 501), and *Virginia Coupon Cases* (114 U. S. 289).

Applying this doctrine to a suit for the infringement of a

patent by Government officers, it follows that it is no defence for the infringing Government officer to assert that he is using the infringing article under authority from the Government, unless he supplements that defence by a further showing that the Government had lawful authority to authorize him to use the device. In this case the Government had no authority to authorize the appellants to use the caisson-gate, because the Government had not obtained a license either to build or use the same. Hence the justification of the appellants was incomplete and they were liable to injunction. A private individual cannot lawfully authorize his agent or employee to infringe a patent. In case of suit against such agent or employee it is no defence to assert that he was directed by his employer to use the device. The Government stands on no better footing. In fact, it stands upon the same identical footing. It cannot lawfully authorize any of its officers or agents to infringe a patent, and if in pursuance of orders from the Government such officers do infringe a patent, they are liable to injunction.

The learned counsel for appellants, at page 12 of his brief, refers to the latter portion of section 910 of the third volume of Robinson on Patents, where the statement is made that officers of the United States, acting upon its behalf but guided by their own volition as distinguished from superior authority, are responsible for acts committed by them in violation of a patent. From that he argues that no liability attaches in the present case, because the officers here were not guided by their own volition in using the caisson-grate, but acted under orders from superior authority.

If the counsel had quoted the first part of the said section 910 as well as the last part, he would have seen that there is no force in the suggestion. The first part of the

section lays down broadly the doctrine applicable to this case, that the Government of the United States cannot authorize any of its officers to infringe a patent, from which it follows that such officers can be enjoined from so doing. The last part of the section quoted by the learned counsel merely specifies an additional case where an injunction will lie, to wit, a case where officers of the Government infringe a patent of their own volition without any direction from or authority of their superior officers. This is apparent from the wording of the section, which says that in such cases "also" such officers are responsible.

This much is certain beyond any peradventure, namely: the Government cannot be reached by a direct suit, because there is no provision for suing the Government for infringement of patents; and if the officers who infringe by direction of the Government are not liable, then the patentee is without any remedy whatever for a grievous wrong. We submit that the law never contemplated any such result; in fact, it is absolutely prohibited by the constitutional guaranty against taking private property for public uses without the consent of the owner or without just compensation.

II.

The second point made by the Attorney-General is as to the amount of the judgment. According to the decree, the sum of $40,000 was awarded as the gains, profits, and advantages which had accrued to the defendants from the making and using of the caisson. It is contended that the defendants did not *make* the caisson, but only *used* it, and hence were not liable for any savings that resulted to the Government from the *making* of the caisson. Undoubtedly the appellants did not *personally*

manufacture the caisson. It was manufactured by the Union Iron Works of San Francisco. But the appellants, or at least some of them, were instrumental in designing the same and superintending its manufacture and placing in position, testing its operation, and thereafter being in charge and control of the same during its operation at the navy yard. The appellant Wolcott was the civil engineer, and the appellant Feaster was the assistant naval constructor at the navy yard, and as such it was their duty to superintend and supervise the designing and construction of apparatus used at the navy yard. The appellant Diamond was an employee, whose actual duty was to use the device and who did use it.

The appellant Belknap, as commandant of the island, had general supervision over all. We submit that the evidence shows that the appellants in question, or at least all of them except Diamond, had practical management and supervision of the *building* of said caisson, representing the Government in that capacity, and within the eyes of the law built the caisson. Beyond question, all of the defendants *used* the caisson in the eyes of the law. We submit that if any gains, profits, and advantages have resulted from the building of the caisson, the appellee is entitled to recover the same, notwithstanding the fact that those gains, profits, and advantages did not accrue to the appellants personally, but to the Government. This follows from the general proposition of law which we have heretofore stated under our first point. If the appellants can be held liable to an injunction, notwithstanding the fact that they acted under directions from their superior officers, it would seem to follow also that, if in so acting profits were realized, the appellee would be entitled to recover the same. The officers in such case merely stand as the representatives of the Government.

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manufacture the caisson. It was manufactured by the Union Iron Works of San Francisco. But the appellants, or at least some of them, were instrumental in designing the same and superintending its manufacture and placing in position, testing its operation, and thereafter being in charge and control of the same during its operation at the navy yard. The appellant Wolcott was the civil engineer, and the appellant Feaster was the assistant naval constructor at the navy yard, and as such it was their duty to superintend and supervise the designing and construction of apparatus used at the navy yard. The appellant Diamond was an employee, whose actual duty was to use the device and who did use it.

The appellant Belknap, as commandant of the island, had general supervision over all. We submit that the evidence shows that the appellants in question, or at least all of them except Diamond, had practical management and supervision of the *building* of said caisson, representing the Government in that capacity, and within the eyes of the law built the caisson. Beyond question, all of the defendants *used* the caisson in the eyes of the law. We submit that if any gains, profits, and advantages have resulted from the building of the caisson, the appellee is entitled to recover the same, notwithstanding the fact that those gains, profits, and advantages did not accrue to the appellants personally, but to the Government. This follows from the general proposition of law which we have heretofore stated under our first point. If the appellants can be held liable to an injunction, notwithstanding the fact that they acted under directions from their superior officers, it would seem to follow also that, if in so acting profits were realized, the appellee would be entitled to recover the same. The officers in such case merely stand as the representatives of the Government.

The appellee cannot recover those profits from the Government, because he cannot sue the Government. The only persons he can sue are the officers of the Government who committed the infringement, and if they are liable for the infringement and can be enjoined from further infringement, they undoubtedly must be liable for the results of their past infringement and for the profits that have accrued to the Government by reason thereof. Undoubtedly, if they were required to pay those profits to the appellee, it would be the duty of the Government to reimburse them, and the Government would be liable to them therefor. But, so far as the appellee is concerned, they and not the Government are liable for those profits. This is but a corollary from the major proposition as to their liability for the infringement. If this were not true, then the appellee's victory would be but a barren one, and the Government would be allowed to profit to the extent of $40,000 by having unlawfully appropriated to its own use the property of the appellee.

Counsel for appellants assert that it does not appear that if Schild's plan had not been adopted Brown's plan would.

We submit that it does so appear, or at least is inferable from the evidence. There were but two plans that could be used. One was the Brown plan, the other the Schild plan. A caisson-gate was absolutely necessary. Mr. Brown, the civil engineer, was authorized to draw plans for one. He did draw plans for one such as the Government was entitled to use, being substantially plans of the caisson-gate then in use at other places. The cost of a caisson-gate made according to these plans was $100,000. The only other plan known was Schild's plan, the cost of which was $60,000. The Government having determined to build a caisson-gate, and it being certain

that a caisson-gate would be built, and there being but two plans according to which it could be built, it necessarily follows that if any particular one of those plans had not been adopted the other would have been. It would seem, therefore, that the Government made a saving of $40,000 by adopting Schild's plan.

Counsel also makes another point to the effect that appellee has already recovered his damages for the making of the caisson-gate. It appears that the appellee brought suit at law against the Union Iron Works to recover damages resulting to him from the making of said caisson-gate, and those damages were assessed at the sum of one dollar, the same having been stipulated by the parties. This, however, is no bar to a recovery of the *gains, profits,* and *advantages* which have resulted from the making of that caisson, because under the patent law a patentee is not only entitled to recover the *damages* which he has suffered, but also the *profits* which have been realized by an infringement.

III.

It is next contended by counsel for appellants that there is not sufficient proof of infringement shown in the record. In this he is entirely mistaken, for if there is one point that is made plain and perfectly clear by the record, it is the question of infringement, and it requires but a small amount of investigation to become convinced of that fact. Exhibit C is a model of the infringing device. It has been sent up with the record in this case and is now in the custody of the Marshal. The most casual and superficial comparison of that model with the two claims of the patent which were found by the lower court to be infringed will demonstrate the infringement. Claims

one and two of the patent were the only ones found to have been infringed.

The first of those claims covers a combination consisting of a plate or deep keel A, the floating body B, the water tanks F, and the outlets of said water tanks *f*, and valved openings in the floating body communicating with the water tanks. The second of said claims consists of a combination of the plate or deep keel A, the floating body B, the double wicket gates G in the keel, and means for operating said wicket gates.

If your honors desire to inquire into the matter of infringement, all that is necessary will be to compare the model, Exhibit C, with those two claims of the patent, and it will be found that said model contains all of the elements of said two claims combined together and operating in the manner described in the patent.

At pages 28 and 29 of his brief, counsel quotes an extract from appellee's testimony for the purpose of showing want of infringement. That testimony, however, was aimed at showing infringement of *claim* 2 of the patent, and not of claims 1 or 4. It possibly does show that there was no infringement of claim 2, and the lower court so found, because the infringing structure had no "air chamber." Claim 2 contained an "air chamber" as an element, and as that was not found in the appellants' gate, there was no infringement of claim 2. But neither claim 1 nor claim 4 contains an "air chamber" as an element. The quoted testimony refers solely to claim 2. It has no reference to claims 1 or 4.

But, further than this, the pleadings on behalf of the appellants in the lower court, consisting of the two pleas and the answer, virtually admit that the appellants have used a caisson-gate containing the patented invention.

On pages 11 and 12 of the record will be found such

admission. It is true that in other portions of the answer *a formal denial of the infringement* is made, but that is a denial of a mere conclusion of law. It is not denied that they are using a caisson-gate, and the construction of that gate as shown by the testimony and the model, Exhibit C, makes it an infringement of the patent.

IV.

Counsel for appellants also *appears* to make the point that the invention patented was not novel or useful. We use the word *appears* advisedly, because it is not quite clear whether he insists on the point or not, and the remarks which he makes on that subject are so plainly insufficient to show a want of novelty or usefulness that we are loath to believe that he will seriously contend for the point.

For instance, he refers to the fact that prior to Schild's invention certain caisson-gates had been used in Scotland, England, and Germany, and from that we would infer his contention to be that such use would invalidate the patent. We have but to remind him, however, that it is a well-settled proposition of the patent law that *prior use in a foreign country* is not sufficient to invalidate an American patent.

The counsel further notes the fact that in April, 1882, the appellee, Schild, made and showed to the appellant Wolcott a drawing of the deep-keel caisson. He then states that Schild's application for a patent was not filed until March 31, 1883, and from that fact he would have us infer, though he does not make the statement, that Schild's patent is void. Of course such a conclusion is so obviously unsound that it requires no comment.

But, further, the novelty of appellee's patent cannot

now be assailed, for the reason that want of novelty was not set up in the answer nor noticed as required by the provisions of section 4920 of the Revised Statutes. By the answer filed in the lower court the appellants raise merely two questions. The first was that of non-infringement; the second was non-liability by reason of the fact that the defendants were officers of the United States Government. They did not in any way, shape, or form deny the novelty or utility of the invention or the validity of the patent, hence no such question as that can be raised at this time. We submit that the decree of the lower court should be affirmed.

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